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*Chairman*: Mr. Verweij (Vice-Chairman) ..... (Netherlands)

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Agenda item 150: Report of the International Law Commission (*continued*)

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*In the absence of the Chairman, Mr. Verweij (Netherlands), Vice-Chairman, took the Chair.*

*The meeting was called to order at 3.15 p.m.*

**Agenda item 150: Report of the International Law Commission** (*continued*) (A/53/10 and Corr.1)

1. **Mr. Nagaoka** (Japan), referring to the topic of State responsibility, said that the term "international crimes of the State" used in connection with draft article 19 might have given the erroneous impression that such crimes were similar to the crimes defined under municipal law. However, the Commission had taken an important step forward by agreeing that the concept of international crime did not provide for the penalization of the State. But many unresolved questions remained. In its further work, the Commission should address the question of whether there was a hierarchy of international obligations, taking into consideration developments in international law, particularly with respect to *jus cogens* rules and *erga omnes* obligations. Neither of those concepts had yet been sufficiently clarified. It should also consider whether different regimes of international responsibility should be applied, depending on the seriousness of the breach of the international obligation, whether punitive reparations were to be allowed, how claims by States not directly affected were to be dealt with, and the relationship between the regime of international responsibility and the United Nations collective security system.

2. His delegation welcomed the deletion of redundant articles on the recommendation of the Drafting Committee. With regard to the acts of State organs (art. 5), it thought that both *acta jure imperii* and *acta jure gestionis* might be attributable to the State, although the issue might have to be considered further from the standpoint of jurisdictional immunities and diplomatic protection.

3. **Ms. Steains** (Australia) said that Australia welcomed the Commission's initiatives to promote greater efficiency in its work and would itself endeavour to provide a more timely input; it encouraged other States to do the same.

4. Principles of State immunity were not necessarily applicable in the context of the topic of State responsibility. For example, the distinction between *acta jure imperii* and *acta jure gestionis* was of limited use in the attribution of State responsibility under draft article 5. In that connection, a State should not be able to misrepresent the status of an entity under its internal law and thus avoid responsibility for the acts of what was in fact an organ of the State.

5. Her delegation noted the five approaches, referred to in paragraph 252 of the report (A/53/10 and Corr. 1) for dealing with the difficult issue of whether a State could commit an international crime. It obviously favoured the approaches which would remove international crimes of States from the draft articles, but the issue should indeed be put to one side for the time being. With regard to draft article 35, preclusion of the wrongfulness of an act should not in all circumstances preclude compensation for damage caused by that act.

6. Chapter III of the draft articles constituted a valuable summary of State practice with regard to countermeasures and struck a fair balance between the interests of the injured State and the wrongdoing State. It might be useful for the Commission to consider the relationship between countermeasures and resort to third-party dispute-settlement procedures, which should not necessarily preclude countermeasures.

7. Australia reiterated the importance which it attached to the topic of State responsibility and endorsed the Special Rapporteur's intention of bringing the topic to completion by the end of the quinquennium. It also agreed that the eventual form of the draft articles should be left open for the time being.

8. In chapter III of its report the Commission asked whether in future it might deal with special issues of international environmental law. The Commission's work programme seemed reasonably full in the short and medium terms, and good progress had been made on environmental law through a number of recent treaties. However, should a precise topic be suggested, Australia would consider it.

9. Turning to the topic of diplomatic protection, she agreed that the Commission should refer to primary rules only for guidance in the formulation of a secondary rule. It should address the admissibility of claims and the law relating to the prior conditions for making a claim. Since claims for diplomatic protection often concerned commercial matters and in view of the Commission's work on preconditions for the exercise of diplomatic protection, in particular the "exhaustion of local remedies" rule, it might usefully address such issues as when a person could claim to have exhausted all such remedies and whether ineffective remedies also had to be pursued. The practice indicated that States might protect their nationals even when there was no entitlement to present an international claim. The Commission could usefully provide guidance to States on that question and on the circumstances under which a State was deemed to have espoused a claim.

10. Australia could support the extension of the topic of unilateral acts of States to cover acts not necessarily performed with the intention of creating legal effects or of altering a State's juridical situation under international law. The absence of such an intention should be regarded as an element in determining the legal effects rather than as a predeterminant of the acts in question. The Special Rapporteur had usefully illustrated some of the distinctions between possible categories of unilateral acts of States which relied upon acts of other States for their efficacy. He might also look at a range of "unilateral acts" and consider their effect in international law. In particular, an examination should be made of State practice as well as formal declarations, including the effect of such practice when inconsistent with a rule of customary international law, and actions giving rise to an estoppel against the State. The latter category consisted of independent acts of State, closely akin to declarations.

11. Australia could see utility in drawing upon both options put forward in connection with the work on the second part of the topic of nationality in relation to the succession of States: to expand the study beyond the context of the succession of States or to keep it within that context and include other questions, for example the status of legal persons. It might happen, for example, that a third State (not a successor State) had to choose between the competing claims of successor States with respect to a legal person. The third State would have to determine the "nationality" of the legal person, drawing on rules which might fall for examination under both the options. Information from States which had faced such problems might help the Commission to decide on its future course of action.

12. On the topic of reservations to treaties, Australia agreed with the principle contained in draft guideline 1.1.5 that unilateral statements by which a State purported to increase its commitments or its rights in the context of a treaty beyond those stipulated by the treaty itself were not to be considered reservations for the purposes of the Vienna Convention. "Extensive" reservations were very rarely made, and while they might purport to "modify" a treaty provision, the essence of a "reservation" was to limit a State's obligations. The Special Rapporteur was right to say that any binding force of such declarations derived not from the treaty itself but from principles of general international law governing unilateral legal acts.

13. **Mr. Elaraby** (Egypt) said that the Commission had maintained in its work a correct balance between the progressive development and the codification of international law. In the selection of future topics the Planning Group should focus on questions lying at the heart of international relations, according to the criteria summarized in paragraph 553 of the report. In particular, the topics should be sufficiently advanced in terms of State practice, a criterion not always observed in the past. In 1998 the Commission had issued two valuable publications, and a third was awaited on the proceedings of the International Law Seminar. The progress made in clearing the backlog of the *Yearbook* was also welcome.

14. On the topic of reservations to treaties, Egypt believed that the Vienna regime should be preserved and was glad that the Special Rapporteur had taken as his starting point the definition of reservations in the Vienna Conventions of 1969, 1978 and 1986. However, there was still room for progressive development. The reservations regime should be universally applied and accommodate the requirements of the whole international community, while still respecting the hereditary distinctive characteristics of the members of the international community. For example, the effect of reservations upon the integrity of a treaty should not be overestimated, for reservations did not serve the purpose of a universal regime if they had the effect of excluding some countries. What was needed from the Commission was a flexible system along the lines of the existing one.

15. Interpretative declarations often provided the only way for States to subscribe to a general multilateral instrument, and the Special Rapporteur should consider them in the light of the specific cultures which influenced the legal regimes of nations. He should also bear in mind that the law of treaties did not make a distinction between human rights treaties and other multilateral treaties: there was no reason for a separate regime on reservations to human rights treaties.

16. Turning to the topic of State responsibility, he noted that the Special Rapporteur had made use of the existing rules on the topic. He agreed with the Special Rapporteur's view that obligations *erga omnes* needed further elaboration. With regard to the relationship between the draft articles and other rules of international law, the draft should continue to respect *lex specialis* and the principles of *jus cogens*. It was also important to respect the parallelism between the law of treaties and the law of international responsibility, while making clear the complementarity of the draft articles with the Vienna Convention. For all its imperfections, the reliance on the distinction between primary and secondary rules seemed the most suitable approach in a codification instrument. It might not be practicable to draft detailed provisions on countermeasures and their relationship with third-party dispute settlements. There was no merit in the distinction between "criminal" and "delictual" responsibility of States unless the impact of such a distinction in terms of

differentiated action to be taken against the wrongdoer was also taken into consideration.

17. Diplomatic protection was the only means for State to protect an individual at the international level. His delegation shared the widely held view that the dictum in the *Mavrommatis* case constituted the customary origin of diplomatic protection and its *locus classicus*. Clearly, diplomatic protection was a prerogative of the State as the "sole claimant". However, guidelines were needed to prevent abuses of the discretionary power of States. The Commission should limit itself to secondary rules and discuss primary ones only when necessary. There was an organic relationship between the topics of diplomatic protection and State responsibility, and the Special Rapporteur should draw on the considerable volume of work already done by the Commission in that connection.

18. With regard to the sub-topic on prevention of transboundary damage from hazardous activities, his delegation felt that the obligations with respect to "damage" were unclear as long as the issue of the "duty of prevention" was made hostage to theoretical considerations of "obligations of conduct". Solid legal bases for measuring compliance and identifying the degree of violation were needed. The dispute-settlement mechanism under discussion might in fact compensate for shortcomings in the existing regime, but it should not stop at direct contact between the parties concerned. While the issues likely to come up were amenable to consultation and negotiation, the mechanism should include all other means of dispute settlements consistent with Article 33 of the Charter: damage was damage whether caused by legal or illegal acts. The sub-topic had to be treated with great caution, for it involved technical as well as legal issues and standards which varied from State to State.

19. **Mr. Kachurenko** (Ukraine) said that his Government appreciated the Commission's decision to limit the scope of its study of unilateral acts of States to the unilateral acts of States issued for the purpose of producing international legal effects. In that regard, priority should be given to State acts producing international legal effects, correlation between unilateral acts and international arbitration or judicial procedures and specific legal regimes, revocability of unilateral acts and effects of the silence of a State or acquiescence. His delegation supported the idea that the binding nature of unilateral acts resided in the sovereignty of States and was based on the principle of reciprocity.

20. The statement by the Parliament of Ukraine on the non-nuclear status of that country served as a good example of an internal instrument creating international legal consequences. The international legal obligation of Ukraine arising out of that unilateral act stemmed not only from an internal legal norm but also from those norms of international law that had been formulated thereafter and had been directly called forth by that act. Accordingly, non-compliance with that internal legal norm would constitute a breach of the respective international obligations.

21. Turning to the topic of State responsibility, he said that it seemed useful to draft the articles on the assumption that the rule of *lex specialis* should be transformed into a general principle. His delegation shared the view of the Special Rapporteur that where specific treaty regimes provided their own framework for responsibility of States, that framework would ordinarily prevail, regardless of whether the draft articles took the form of a convention or of a declaration of principles. The form of the draft articles could be decided upon after a generally acceptable text was reached. His delegation supported the proposal to adopt a code of State responsibility under international law that would be similar to a convention by its content while resembling a General Assembly declaration in its binding character. With regard to the distinction between "criminal" and "delictual" responsibility of States, a breach of law by a State should be seen as an internationally wrongful act rather than as a crime, and the concept of "State crime" should not be used in the draft. The Special Rapporteur's proposal that that concept should be either excluded or replaced by the notion of "exceptionally serious wrongful acts" seemed satisfactory. His delegation also supported the view that the law of State responsibility did not require the establishment of criminal and civil responsibility as two different types of responsibility.

22. **Mr. de Saram** (Sri Lanka) said that it was important to consider the relationship between the topics of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law, a relationship found in the problem of transboundary harm. There were different degrees of transboundary harm; the difficulty arose when such harm was catastrophic in nature. In such cases, it would be unfair not to make provision for compensation or for some type of expeditious procedure for the disposal of claims, perhaps through the creation of ad hoc claims tribunals or appropriate shifts in the burden of proof.

23. The Commission had failed thus far to confront the difficulties inherent in the question of the obligation to compensate, and instead had moved into consideration of preventive measures, an area in which he did not think it had any particular expertise. He did not mean to be too critical of the Commission; however, the subject of the obligation

to compensate at the inter-State level in a case of transboundary harm of great magnitude raised difficult issues and uncertainties under international law where authoritative international judicial or arbitral guidance was sparse.

24. The Committee might eventually need to ask the Commission to consider the question of the obligation to compensate in cases of transboundary harm. He was not sure, however, what the better course would be. Perhaps the question might be left to *ex gratia* consideration; some States seemed to be moving towards the provision of compensation for humanitarian reasons.

25. Some held the reasonable view that the question of the obligation to compensate – in a case where no treaty governed – should be considered as a matter of State responsibility. On the other hand, he did not agree with those who believed that under the rules of State responsibility, the only criterion that applied in international law in a case of transboundary harm was the criterion of due diligence, or that what was involved was an obligation of conduct and not an obligation of result. While it was true that State responsibility arose from an internationally wrongful act, further deliberation would be needed on the matter of when, in the absence of a treaty obligation, an international wrong occurred.

26. His delegation had a number of suggestions for the Commission's work on State responsibility: the Commission should complete its work on State responsibility within a year or two; the draft articles should take the form not of a draft convention, but of a declaration of the General Assembly; the draft articles should be limited to the substantive rules of State responsibility alone, and should not enter into the general question of settlement of disputes; and lastly, the draft articles should not include provisions on countermeasures, which should instead be included in the Commission's agenda as a separate topic in its future programme of work.

27. He wished to suggest that the Special Rapporteurs should discuss among themselves and present to the Sixth Committee their ideas on how the Committee's examination of the Commission's report might best be conducted. The Commission might take each of the principal issues of a topic and break them down into their various components, with a view to creating a framework for an active and fruitful discussion. If such an itemization of principal issues was considered helpful by the Commission, the place for such a suggestion would be chapter III of the report.

28. **Mr. Tomka** (Slovakia) noted with satisfaction the progress made by the Commission in submitting to the Sixth Committee a full set of 17 draft articles on prevention of transboundary damage from hazardous activities. His delegation supported the decision made by the Commission in 1997 to divide the topic, and felt that the Commission should proceed first with the second reading of the draft articles on prevention before eventually embarking upon the second part of the topic, i.e., the liability itself. At first glance, the draft articles on prevention seemed to him to be well conceived, since they were aimed at emphasizing the duty of prevention and striking a fair balance between the interests of the States concerned.

29. The duty of prevention was by definition an obligation of conduct, and the Commission should continue to treat it in that way. Failure to comply with the duty of prevention should entail legal consequences under the law of State responsibility. That approach did not exclude the civil liability of the operator who had actually caused the damage, in particular when relevant conventions were applicable.

30. Concerning the final form of the draft articles, his delegation favoured a framework convention rather than a model law.

31. The dispute settlement provisions in article 17 seemed to provide sufficient flexibility when combined with compulsory fact-finding. The details and modalities of establishing a fact-finding commission should be elaborated in an annex and be inspired by the recent example provided in article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses.

32. Concerning diplomatic protection, he said that Slovakia had welcomed the inclusion of the topic in the Commission's agenda and hoped that it would move towards a formulation of draft articles on the topic, including commentaries. The aim of completing the first reading of a text on the topic by the year 2001 did not seem realistic since the Special Rapporteur had recently been elected a judge of the international tribunal for the former Yugoslavia, and the Commission would have to appoint a new Special Rapporteur. What was needed was a practical approach to the topic based on State practice, with theoretical discussions being kept to a minimum. His delegation endorsed the main conclusion of the Working Group that the customary law approach to diplomatic protection should form the basis of the Commission's work on the topic. The exercise of diplomatic protection was a right of the State and was subject to its discretionary power of decision. His delegation did not share the views of those who suggested that the State, when exercising diplomatic protection, was simply acting as an agent of its national who had a legally protected interest at the international level. The Special Rapporteur

and the Commission should focus on the admissibility of claims and the preconditions for the exercise of diplomatic protection. Slovakia considered that diplomatic protection should not be linked to human rights issues in the draft articles on the topic. Those two institutions of international law were separate and fulfilled different functions.

33. His delegation was not fully convinced of the need to change the title of the topic to "Diplomatic protection of person and property", as suggested by the Special Rapporteur in his preliminary report. The Commission should proceed first to the codification of rules concerning diplomatic protection of natural persons, where a substantive body of law already existed, and only later turn its attention to the issue of the diplomatic protection of legal persons.

34. It was very important to reach agreement on the scope of the topic of unilateral acts of States, and it would be advisable to elaborate a definition of a unilateral act to which the rules to be formulated by the Commission would be applicable. He endorsed the suggestion by the Special Rapporteur that the Commission's work should focus on those unilateral acts of States which were strictly or purely unilateral in nature, of an autonomous character and intended to produce legal effects. He also shared the view that certain categories of unilateral acts should be excluded from the study, namely unilateral political acts, unilateral acts of international organizations, unilateral acts of States which gave rise to international responsibility, and unilateral acts falling within the scope of the law of treaties.

35. Slovakia subscribed to the general feeling in the Working Group with regard to the form which the work on the topic should take, namely the elaboration of possible draft articles with commentaries, without necessarily prejudging the final legal status which might be given to such draft articles. Slovakia also supported the recommendation of the Working Group to the Special Rapporteur concerning his future work. Nevertheless, his delegation had not been persuaded by the arguments of those who considered that the Special Rapporteur should examine the questions of estoppel and silence with a view to determining what rules, if any, could be formulated in that respect in the context of unilateral acts of States. Those issues were outside the scope of the topic.

36. With respect to specific comments requested by the Commission, Slovakia agreed that the scope of the topic should be limited to declarations, but did not see any particular reason why the topic should not be extended to unilateral acts of States issued to other subjects of international law, namely intergovernmental organizations.

37. The topic of nationality in relation to succession of States was of great relevance to his country which, together with the Czech Republic, had quite recently undergone a process of State succession, following the dissolution of the former Czech and Slovak Federal Republic. His delegation would shortly submit written comments on the set of 27 articles on the topic which the Commission had adopted in 1997.

38. Concerning the second part of the topic, namely, the question of the nationality of legal persons in relation to succession of States, he noted that Slovakia had not faced any practical problems in that respect after the dissolution of the former federation. That could be explained by the fact that both States had generally maintained the legal order of the former federation, according to which the nationality of a legal person was determined by its registration in the commercial records maintained by the district court where the headquarters of a company were located. His delegation did not see any practical need for the Commission to pursue that part of the topic, although it would not oppose such a course of action if some other States found that it would be useful. His delegation had serious doubts about the first option outlined by the Working Group, namely that the study of the question of the nationality of legal persons might be expanded beyond the context of the succession of States to the question of the nationality of legal persons in international law in general.

39. State responsibility was the most important, and also the most complex, item on the Commission's agenda. The draft articles provisionally adopted by the Commission on first reading had already had an impact on State practice and had recently been referred to by the International Court of Justice in a decision. He suggested that the Commission should prepare its final draft of the articles with a view to the adoption of a convention. He supported the proposal to combine draft articles 5 and 6; however, he saw no reason to distinguish between *acta jure gestionis* and *acta jure imperii* since an official act of any State organ, regardless of its nature, was attributable to that State.

40. With regard to draft article 19, while he recognized that State responsibility was neither criminal nor civil in nature, he did not think that it would be justified to omit any distinction between different categories of internationally wrongful acts from the draft. Perhaps the word "crime", which was somewhat misleading, could be replaced by a more appropriate term.

41. He supported the decision of the Special Rapporteur on reservations to treaties to establish a definition of reservations and interpretive declarations before embarking

on other aspects of the topic and endorsed the draft guidelines adopted by the Commission at its 1998 session.

42. The Commission had asked Governments to comment on whether unilateral statements by which a State purported to increase its commitments or its rights in the context of a treaty beyond those stipulated by the treaty itself would or would not be considered as reservations. In his view, a declaration purporting to increase a State's commitments did not constitute a reservation since it did not limit the legal effect of certain provisions of the treaty in their application to that State, although it might be subject to the rules which governed unilateral acts. A unilateral statement which purported to increase a State's rights and, by so doing, to impose further obligations on other parties to the treaty, did not constitute a reservation, but rather an offer to conclude either a modified form of the treaty or a parallel treaty relationship in addition to the primary treaty. In either case, the consent of the other parties to the treaty was required.

43. **Ms. Telalian** (Greece), referring to chapter IV of the report, said that she fully concurred with the emphasis which the Commission had laid on the prevention of transboundary harm as a preferred policy. She also agreed with the approach whereby a State was obliged to prevent or minimize the risk of causing significant transboundary harm and could incur responsibility by violating that obligation, which, as reflected in draft articles 3, 6, 7, 8 and 10–13, appeared to be based on the rule of due diligence. Draft articles 10, 11 and 12 balanced the interests of both sides and contained elements which further emphasized the non-absolute character of that duty of prevention. However, the expression "reasonable time", in draft article 10, was too vague and should therefore be more precisely defined. Her delegation currently had no fixed position on the specific questions posed by the Commission as to whether the duty of prevention should continue to be treated as an obligation of conduct or be instead subjected to the law of State responsibility. It would, however, give careful consideration to those delicate questions, to which the Commission should attach the utmost importance in its future work, taking into particular account the ongoing effort of the international community to strengthen the principles of international environmental law. The compulsory fact-finding procedure provided for in draft article 17 on settlement of disputes seemed to be the most effective way of objectively determining the relevant facts. She failed to see, however, why initiation of the procedure should be delayed for six months in the absence of agreement between the parties.

44. Having stressed the importance which she attached to the Commission's consideration of the question of reservations to treaties as a matter of first priority, she observed that the Vienna Conventions were unclear concerning the legal effects of incompatible reservations, particularly those raised in connection with human rights treaties. The same confusion was equally apparent in the State practice concerning the system of objections and acceptances to impermissible reservations, while there was an urgent need to ascertain the conditions under which a State could make reservations with purported legal effects and become a party to the treaty. The Commission should thus find appropriate ways of facilitating the practical application of the complex system of reservations and their acceptance by States.

45. She had no problem with the definition of reservations contained in draft guideline 1.1; the attempt to arrive at a clear definition had theoretical value and was also of great practical importance to States in determining the permissibility of a reservation. Under the Vienna definition, the name applied to a unilateral statement was of little importance. Instead, it was more important to tackle the question of whether a unilateral statement was a reservation on the basis of safe and well-defined criteria. Reservations aimed at clarifying the meaning of a provision were interpretative declarations, a distinction that seemed clear enough *in abstracto*. In actual practice, however, there were many instances where the purport of interpretative declarations went further. Such confusion and ambiguity could therefore be clarified with the adoption of draft guideline 1.2, which defined interpretative declarations.

46. She agreed with the Special Rapporteur that a formalistic approach concerning the form of a reservation was unnecessary and also agreed with draft guideline 1.1.7 concerning reservations formulated jointly. She further agreed with the clarification concerning the object of reservations contained in draft guideline 1.1.4, although she did not accept that a unilateral statement by which a State intended to commit itself beyond its treaty obligations constituted a reservation. The same applied to statements relating to the non-recognition of States, which should instead be governed by the law on State recognition. Lastly, she concurred with draft guideline 1.1.3, which reflected well established practice in the field of reservations having territorial scope.

47. **Mr. Kocetkov** (Bosnia and Herzegovina), referring to chapter IX of the report, said that draft guideline 1.1 comprised an acceptable definition of reservations to treaties. In its future work on the complex and delicate issues involved in the topic, the Commission should pay particular attention to defining clearly the criteria for determining the impermissibility of reservations and interpretative declarations. As a successor State, his country was interested

in a review of the possibility whereby, as in the case of newly independent States, new States that had emerged from the dissolution of a former State could express reservations and interpretative declarations when notifying their succession to a treaty, thus enabling them to achieve equality of treatment and position in terms of international law.

48. **Mr. Chee** (Republic of Korea), referring to chapter VI of the report, noted that the Commission had seemingly embarked on the enormous task of identifying unilateral acts of States, which should be completed prior to any codification. Elaborating on his delegation's written comments on the draft articles on State responsibility, he said that draft article 19 served no useful purpose and should be deleted, as it was inappropriate to equate a sovereign State with a common criminal by describing its conduct, however brutal, as "penal", for it was the penal act of an individual which rendered a State culpable of a penal act. In such instances, the term "international wrongdoing of a State" should suffice. Further pedantic debate on the distinction between "criminal" and "delictual" responsibility would be unproductive and time-wasting. Furthermore, in view of the recent establishment of the International Criminal Court, he believed that consideration of the subject of international crimes could be deferred.

49. Concerning the draft guidelines on reservations to treaties, he expressed concern over the lack of any clear distinction between reservations to treaties and interpretative declarations, which was admittedly difficult to achieve. Having quoted the definition of a reservation contained in article 2 of the 1969 Vienna Convention, he referred to the discussion of its elements contained in the ninth edition of *Oppenheim's International Law*, in which it was observed that it was the substance of a unilateral statement rather than its nomenclature, which determined whether it constituted a reservation, and that some unilateral statements did not purport to exclude or modify the legal effect of certain provisions of a treaty. The author had added that borderline cases would inevitably arise involving in particular interpretative declarations, and then the question of whether they constituted reservations, could only be answered on the merits of each particular instance. With those comments in mind, he endorsed the Special Rapporteur's suggestion that a definition of interpretative declarations should be included in the Guide to Practice, although he was uncertain as to how successfully it could be applied. As matters stood, however, he was disappointed by the failure to achieve a clear distinction between the two concepts and hoped that further efforts would be made to do so, particularly since the practice of making interpretative declarations was currently becoming more common.

50. **Mr. Crawford** (Special Rapporteur on State responsibility) said that he welcomed the Committee's decision to permit the Commission's Special Rapporteurs to address it and that it was not too late for Governments to transmit their comments to the Special Rapporteurs; however, in order for such observations to be as useful as possible, they should be received by early 1999.

51. There was general support for the core concept established in draft article 4. The issue of damages remained to be resolved but, in his opinion, there was greater consensus on that matter than might appear. Some delegations took the view that damages were the essence of responsibility in all cases; however, appropriate penalties varied according to the nature of the primary rule that had been breached. For example, in the case of transboundary pollution, actual harm must have occurred before damages were called for, as stated in the Helsinki Principles and the Rio Declaration. In other cases, mere violation of a norm entailed damages, as in the case of a violation of diplomatic immunity through detention of a diplomat, even under optimum conditions, or infringement of a State boundary, even when no harm ensued. Thus, it was the formulation of the primary rules which determined the question of damages.

52. With regard to draft articles 5–15, which dealt with the concept of attribution, he welcomed the consensus in the Committee that the distinction between *jure imperii* and *jure gestionis* was irrelevant in that context, although not in that of immunity. While there was general support for the Commission's amendments to articles 5 and 8, there was less agreement on the issue of State crimes, a matter on which the Commission had also failed to reach consensus. It was clear that the existing text, which established but failed to develop a distinction between crimes and delicts, required amendment. There appeared to be general agreement that the terms "penal", "criminal" and "delictual" were not indispensable and that it was the substance of the matter which was most important. Furthermore, it was clear that the notion of criminal law and criminal sanctions, in the context of national legal systems, were wholly inapplicable to States under international law. While the idea of prosecuting States themselves had a certain appeal, such a concept was wholly unrealistic. Thus, State responsibility was neither civil nor criminal in the normal sense.

53. However, some wrongful acts, such as genocide and aggression, were far more serious than ordinary breaches of international law which could be resolved bilaterally, while other breaches entailed State responsibility because their consequences affected the international community as a whole. Giving full effect to that concept might provide a solution to the apparent dilemma posed by article 19.

54. The Commission planned to conclude its work on State responsibility by the year 2001. At its next session, it intended to complete its work on articles 16–35 (Part One) and to make as much progress as possible on Part Two. The issues of countermeasures and dispute settlement would require further consideration and, in my case, there was no consensus on whether they should be included in the draft. The Commission would then devote the rest of the quinquennium to settling the question of article 19, determining the final form of the draft articles and producing a full text with commentary.

55. **Mr. Baena Soares** (Chairman of the International Law Commission) expressed the hope that the Committee would continue its practice of allowing the Commission's Special Rapporteurs to address it and that the Commission would be able to continue to divide its session into two parts and to meet in both New York and Geneva. During the past few years, the Commission had improved the methods and quality of its work in order to better fulfil its mandate and increase its relevance to international law. However, there was a need for further measures to ensure that Governments received the Commission's report in time to prepare adequate comments. The Commission's success was dependent on the Committee's support and cooperation and on the observations, information and statistics provided by Governments. While written replies were always appreciated, oral statements were also taken into consideration by the Commission.

56. **The Chairman** said that the contributions of the Special Rapporteurs and Chairmen of the Commission had resulted in an extremely useful dialogue which he hoped would continue. Discussion of the 1998 report of the Commission had been a highlight of the Committee's work during the current session of the General Assembly.

*The meeting rose at 5.30 p.m.*